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Recent Cases

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HEALTH AND ENVIRONMENT—PRELIMINARY INJUNCTION MAY ISSUE ON THE SHOWING OF NONCOMPLIANCE WITH NEPA STANDARDS FOR ENVIRONMENTAL IMPACT STATEMENTS—*Sierra Club v. Coleman,* 421 F. Supp. 63 (D.D.C. 1976)

The National Environmental Policy Act (NEPA),[1] enacted in 1969, establishes procedures for environmental protection in federally funded projects. In 1970, Congress authorized federal funds for building the Darien Gap Highway through Panama and Columbia in order to connect the Pan American Highway system of South America with the Inter-American Highway.[2] The region through which the project would extend is one of the last remaining areas undisturbed by modern civilization, and is the home of the Cuna and Choco Indian tribes. In April, 1974, well after the project was underway and well after the route of the highway was chosen, the Federal Highway Administration prepared and circulated an Environmental Impact Assessment draft. A Final Assessment was circulated in December, 1974.

The plaintiff environmental groups, pursuant to Rule 65 of the Federal Rules of Civil Procedure, brought suit in October, 1975, against the Secretary of Transportation, among others, seeking a preliminary injunction on grounds that the production and distribution of the Assessments satisfied neither the procedural nor the substantive requirements of NEPA. The court agreed and issued a preliminary injunction, enjoining further construction of the Darien Gap Highway until the defendants fulfilled both the procedural and substantive conditions of NEPA.[3]

By September, 1976, the defendants had complied with the procedural requirements of NEPA by producing a Final Environmental Impact Statement (FEIS) for the project. They then sought to begin construction, but the environmental groups requested an extension of the preliminary injunction, alleging that the defendants had not met the substantive standards of NEPA. The court agreed and extended the injunction

1. 42 U.S.C. §§ 4321-47 (1970).
2. 23 U.S.C. § 216 (1970).
3. Sierra Club v. Coleman, 405 F. Supp. 53 (D.D.C. 1975).

until the substantive requirements were met.[4]

The facts and issues in the two proceedings are interwoven. In granting the injunctions the court dealt with the following three issues: (1) Was injunctive relief proper?; (2) Did the defendants' Assessments comply with the procedural requirements of NEPA?; and (3) Did the defendants' Assessments or their FEIS comply with the substantive NEPA standards?

In the first proceeding, the court addressed the question of whether the traditional conditions for granting equitable relief must be present in order to issue an injunction under NEPA. After quoting from *Atchison, Topeka, and Santa Fe Railway Co. v. Callaway,*[5] and noting other federal court decisions,[6] the court rested its conclusion on *United States v. City and County of San Francisco,*[7] in which "the Supreme Court approved the granting of an injunction without a balancing of the equities in order to give effect to a declared policy of Congress, embodied in legislation."[8] Thus, the court reasoned that because NEPA is a "declared policy of Congress," a balancing of the equities was not required in order to issue an injunction based on noncompliance with NEPA standards.

The second issue raised in the initial proceeding was whether the defendants had complied with NEPA requirements. In determining that the defendants had not met NEPA standards, the court found that the production and circulation of the Assessments did not meet the procedural requirements of NEPA. NEPA specifies that prior to issuing an Environmental Impact Statement (EIS) "the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."[9] The court asserted that "there is no question but that the environmental effects of major highway construction is within the expertise of

4. Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C. 1976).

5. 382 F. Supp. 610, 623 (D.D.C. 1974).

6. Keith v. Volpe, 352 F. Supp. 1324, 1349 (C.D. Cal. 1972), *aff'd,* 506 F.2d 696 (9th Cir. 1974), *cert. denied,* 420 U.S. 908 (1975); Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971).

7. 310 U.S. 16 (1940). The court ignored another line of cases asserting that the general requirements for the issuance of a preliminary injunction need to be satisfied under NEPA. *See* Canal Auth. v. Calloway, 489 F.2d 562 (5th Cir. 1974); Sierra Club v. Froehlke, 345 F. Supp. 4440 (W.D. Wis. 1972); Environmental Defense Fund v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971).

8. 405 F. Supp. at 55.

9 42 U.S.C. § 4322(C) (1970).

EPA [Environmental Protection Agency],"[10] and therefore the defendants should have consulted EPA. Since the agency was not consulted, the court held that the procedural requirements of NEPA were not fulfilled.

Eleven months later, after the Department of Transportation had prepared a FEIS and consulted with the EPA, the environmental groups sought to continue the injunction on grounds that the defendants had not satisfied the substantive requirements of NEPA. The court noted that the purpose of an EIS is "to provide a detailed discussion sufficient to allow the agency decision-maker to fully consider in his or her decisional calculus the possible environmental effects of various alternative paths the agency might choose to pursue with respect to a given project."[11] Thus, in analyzing if the defendants' Assessments and FEIS fulfilled the NEPA requirements, the court considered whether the decision makers were given the information necessary to arrive at an informed decision concerning the environmental impact of the project. In the course of this analysis, the court found the Assessments and the FEIS deficient in three areas.

First, the court concluded that neither the Assessments nor the FEIS adequately discussed the control of the transmission of aftosa or foot-and-mouth disease into North America via the Darien Gap Highway. In the court's view, a deficient inquiry into possible failure of the control programs resulted in noncompliance with NEPA, because without full inquiry into the spread of the disease the public would not be informed of the problem and the decision making agency would not receive the public commentry which NEPA requires be included in the decisionmaking process.

Second, the court found that both the Assessments and the FEIS failed to sufficiently discuss possible alternatives to the proposed action as NEPA demands. Both the Assessments and the FEIS commented on the possibility of an alternate route, but because the discussions were devoted to engineering and cost problems, and not to the environmental impact, the court concluded that the inquiry was inadequate for NEPA purposes.

Finally, the court pointed out that the FEIS insufficiently analyzed the project's impact upon the Cuna and Choco Indians residing in the Darien Gap region. The court noted that no

10. 405 F. Supp. at 55.

11. 421 F. Supp. at 65. *See also* Calvert Cliffis Coordinating Comm. v. Atomic Energy Comm'n, 499 F.2d 1109 (D.C. Cir. 1971).

serious anthropological or ethnographic studies were attempted, and therefore the informed decision called for by NEPA was impossible.

Despite excellent discussions of the procedural and substantive aims of NEPA, the importance of the two equitable proceedings lies in what the court did not say. Omitted from the court's discussion is an analysis of whether NEPA has extraterritorial effect. Since the construction of the highway is in Panama and Columbia a question arises as to the court's jurisdiction in foreign states. Does the court have the authority to issue an injunction against the construction of a highway in a foreign state?

In the first proceeding the court seemed to side-step the issue by saying: "the defendants in their opposition to plaintiffs' motion make no claim that an environmental impact statement is not required . . . ."[12] Thus, the court decided the case on the assumption that an EIS was required. However, the order not only enjoined the defendants, who are United States officials, but also "any person in active concert or participation with them."[13] Does this order apply to the states of Panama and Columbia, both of which contributed 25% of the funds for the project, and to foreign corporations involved with the project? One answer appears to be that NEPA, at the very least, gives a federal court authority over federal funds, if not the power over foreign states.

The broad injunctive order issued by the court may be read to imply that the court concluded it had the authority to enjoin foreign states and corporations and thereby give extraterritorial effect to NEPA. Unfortunately for environmental groups, the court did not explicitly make this finding, and thus the use of these cases as precedents to justify extraterritorial effect of NEPA remains attenuated. However, these are the only cases available on the subject and no matter how attenuated the inference, the fact remains that an injunction based on NEPA was issued to stop a federally funded project in a foreign land.[14]

Scott J. Engers

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12. 405 F. Supp. at 56.

13. *Id.*

14. Several actions have been initiated based upon the extraterritorial effect of NEPA. But, they have been settled out of court. The government agencies involved in these actions agreed to prepare environmental impact statements. *See, e.g.*, Environmental Defense Fund v. Agency for Int'l. Dev., Case No. 75-0500 (D.D.C., filed Apr.

8, 1975) (international pesticide program); Sierra Club v. Atomic Energy Comm'n, 4 ENVIR. REP. 20,685 (D.D.C. Aug. 3, 1974) (construction of nuclear power plants abroad); *see* Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 351 (1975); *International Application of NEPA: Environmentalist Challenge Pesticide Aid Program*, 5 ENVIR. REP. 10,086 (1975); Jackson, *Legal Problems of International Relations* 252 (1977); New York Times, March 17, 1976, at 25.

SEARCH AND SEIZURE—NO MEDICAL EMERGENCY JUSTIFYING ADMINISTRATION OF EMETIC WHERE DEFENDANT SWALLOWS NARCOTIC FILLED BALLOONS—*People v. Rodriguez*, 71 Cal. App. 3d 547, 139 Cal. Rptr. 509 (1977).

While driving his automobile, Fernando Rodriguez was stopped by police officers armed with a warrant to search his residence, automobile, and person.[1] As the officers approached Rodriguez, they saw him swallow several balloons. Rodriguez was arrested,[2] taken to a police station for interrogation, and taken to a hospital one hour later.

Acting on the police officers' information that Rodriguez had swallowed heroin in rubber balloons, the treating physician determined that regurgitation of the objects was necessary to prevent possible rupture or decomposition of the balloons by gastric acid, which would release toxic quantities of heroin into Rodriguez's system. The physician proceeded to administer a nasal emetic to facilitate regurgitation of the balloons. During this procedure Rodriguez was not handcuffed or otherwise restrained, did not resist, and suffered no pain. Balloons containing heroin were regurgitated.

At his trial, Rodriguez alleged that the balloons were obtained by the police through an unreasonable search and seizure, and moved to suppress the balloons as evidence pursuant to California Penal Code section 1538.5.[3] In opposing the suppression motion, the state relied on language from *People v. Bracamonte*,[4] which implies that such evidence is admissible if the defendant is not coerced and does not resist the emetic, and the treating physician determines that regurgitation of the objects is a necessary medical procedure.[5] The trial court de-

1. The validity of the warrant, issued on the basis of an informant's information, was not contested. People v. Rodriguez, 71 Cal. App. 3d 547, 549, 139 Cal. Rptr. 509, 510 (1977).

2. The probable cause for Rodriguez's arrest was not contested. *Id.* at 549, 139 Cal. Rptr. at 510.

3. *See* CAL. PEN. CODE § 1538.5 (West Supp. 1977). Section 1538.5 provides for the exclusion of evidence obtained during a search and seizure if:

> (1) The search or seizure without a warrant was unreasonable.
>
> (2) The search or seizure was unreasonable because . . .
>
> (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

Id.

4. 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975).

5. There is, of course, no right to conceal or destroy evidence of

nied Rodriguez's motion, and under the terms of a plea oargain, found him guilty of possession of heroin and granted probation.

In reversing the trial court's ruling on the motion, the court of appeal acknowledged that the central issue was whether or not there was a medical emergency justifying the administration of the emetic. The court declared "we are obligated to make our own, independent, examination of those circumstances for the purpose of determining whether they meet the constitutional standard for a valid search."[6]

The appellate court's independent examination satisfied it that no actual emergency existed—the physician had exercised only "commendable caution." In making this determination, the court found it crucial that the physician had relied only on the police officers' information in deciding the procedure was necessary, without observing any manifestations of heroin ingestion by Rodriguez.

Although the physician decided that the balloons should be removed before they could break and release toxic amounts of heroin into Rodriguez, making treatment too late to be of value, the court held that mere possibility, without other circumstances, did not constitute a medical emergency justifying the emetic procedure

> either as a means to prevent the loss of the contraband or as a necessary precaution for [defendant's] life. Nothing in this record justifies any conclusion but that, had the normal processes of digestion and elimination been allowed to take their course, the balloons would have been recovered and defendant been healthy.[7]

People v. Rodriguez differs markedly from a long line of cases prohibiting intrusion into a person's body where force and resistance are present and no medical emergency is alleged.[8] The *Rodriguez* court based their decision on *Bracamonte*, but

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> criminal conduct. If, in the instant case, there was reasonable cause to believe that the balloons would not pass through the digestive tract but would instead break open and thereby dissipate, not only would the potential health hazard possibly justified the intrusion into defendant's stomach, but the fear of the destruction of evidence might also justify remedial action.

Id. at 403, 540 P.2d at 631, 124 Cal. Rptr. at 535.

6. 71 Cal. App. 3d at 551, 139 Cal. Rptr. at 511.

7. *Id.* at 557, 139 Cal. Rptr. at 514.

8. *See generally* Comment, *Constitutionality of Stomach Searches*, 10 U.S.F. L. REV. 93 (1975).

the cases differ significantly. In *Bracamonte*, the defendant swallowed seven balloons containing heroin and actively resisted the nasal administration of an emetic—she was handcuffed, restrained by police officers and medical personnel, and eventually strapped to a table. The procedure was so painful that she finally relented and agreed to drink an emetic. The treating physician acted solely on what he believed was a valid warrant presented to him by police officers authorizing the administration of an emetic. The physician testified that without the warrant he would not have forced regurgitation. No medical emergency was alleged.

In upholding the motion to suppress, the *Bracamonte* court focused on the excessive force that was required to administer the emetic. *Rodriguez* shifts this focus, requiring a medical emergency to justify the procedure. This significant distinction was not made by the court in *Rodriguez*. Since *Rodriguez* does not affect *Bracamonte's* holding on excessive force, it creates a two-pronged standard for admissiblity. First, there must be no coercion, and second, the medical emergency must be more compelling and urgent than the mere possibility of danger. The court leaves open what constitutes a justifying medical emergency.

Rodriguez puts new limits on search and seizure inside the human body. The court of appeal determined that no medical emergency existed as a matter of law, although physicians treating private patients could, and perhaps should, normally take the precaution of administering an emetic. The *Rodriguez* court's reluctance to approve seizure instrusions into the human body unless absolutely necessary to protect the defendant's life suggests a strict interpretation of dicta in *Bracamonte*. As the latter court noted:

> There is, of course, no right to conceal or destroy evidence of criminal conduct. If, in the instant case, there was reasonable cause to believe that the balloons would not pass through the digestive tract but would instead break open and thereby dissipate, not only would the potential health hazard possibly justify the intrusion into defendant's stomach, but the fear of the destruction of evidence might also justify the remedial action.[9]

Rodriguez does not encourage narcotic carriers to swallow objects to prevent their admissibility into evidence because the

9. 15 Cal. 3d at 403, 540 P.2d at 631, 124 Cal. Rptr. at 535.

objects are admissible after passing through natural digestive and eliminatory processes. Left unresolved, however, is the problem of defendants submitting to an emetic procedure as Rodriguez did, in order to present a subsequnt claim of unreasonable search and seizure and prevent admission of the evidence.

Rodriguez may also create a conflict between medical personnel and police officers. Physicians confronted with a *Rodriguez* situation would still normally remove the balloons as a precautionary measure. Police officers, however, aware that objects so removed are inadmissible evidence, are likely to be discouraged from consulting physicians, or to try to prevent attending physicians from complying with standard medical procedure. Should balloons that would routinely be removed rupture or disintegrate, unresolved questions of civil liability are presented.

William F. Abrams

LEGAL ADVERTISING—PROHIBITION OF ALL FORMS OF LEGAL ADVERTISING VIOLATES THE FIRST AMENDMENT—*Bates v. State Bar,* 433 U.S. 350 (1977).

Two Arizona attorneys placed an advertisement in a local newspaper listing their fees for certain routine legal services.[1] Upon appearance of the ad, the Arizona State Bar filed a complaint charging the attorneys with violating Arizona's version of the American Bar Association's (ABA) Disciplinary Rule 2-101(B),[2] promulgated by the state supreme court as part of its regulation of the state bar. The filing of the complaint triggered a series of state bar administrative hearings, which ultimately resulted in a finding that the attorneys had violated the disciplinary rule and a recommendation that they be suspended from the practice of law for a brief period.

As permitted by state bar procedures, the attorneys sought review of the administrative findings by the Arizona Supreme Court. At this proceeding they charged that the disciplinary rule violated sections one and two of the Sherman Act and infringed their rights under the first amendment of the United States Constitution. The Supreme Court found that the rule was insulated from the Sherman Act attack by the state-action exemption established in *Parker v. Brown.*[3] On the first amendment issue, the Arizona court noted that although *Virginia Pharmacy Board v. Virginia Consumer Council*[4] had recently entitled commercial speech to first amendment protection,

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1. The ad covered fees for uncontested divorces, adoption, bankruptcy, and change of name. Bates v. State Bar, 433 U.S. 350 (1977).

2. ARIZ. REV. STAT. ANN., Rules, Sup. Ct. 29(a), D.R.2-101(B) (Supp. 1977) provides in relevant part:

> (B) A lawyer shall not publicize himself, or his partner, or his associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

3. 317 U.S. 341 (1943). *Parker* established that the Sherman Act does not prohibit competitive restraints imposed by a state acting as sovereign. However, the restraint must be affirmatively commanded by the state rather than one to which the state merely acquieces. *Id.* at 352.

4. 425 U.S. 748 (1976). Prior to *Virginia Pharmacy*, Valentine v. Christensen, 316 U.S. 52 (1942), had indicated that purely commercial speech was beyond the purview of constitutional protection. *Virginia Pharmacy* struck down a Virginia statute that prohibited the advertisement of prescription drug prices on the theory that even purely commercial speech was protected by the first amendment. In overruling *Valentine,* the Court acknowledged the state's strong interest in maintaining standards for pharmacists, but subordinated the state's concerns to the public interest in the free flow of information. 425 U.S. at 761-65.

Chief Justice Burger's concurring opinion hinted that attorney advertising would be subject to special consideration. Seizing upon this language, the Supreme Court declined to afford the attorneys' advertising first amendment protection and sustained the restrictions laid out in the disciplinary rule.

In the aftermath of this decision, the attorneys presented their case to the United States Supreme Court. Again, they maintained that the disciplinary rule unlawfully restrained competition in violation of the Sherman Act and infringed publication of protected speech in contravention of the first amendment.

The Supreme Court summarily disposed of the attorneys' Sherman Act claim, finding the alleged restraint on advertising the affirmative command of a sovereign state and, as such, squarely within the *Parker* state-action exemption.[5]

Upon concluding that the attorneys' Sherman Act claim was barred, the Court next considered whether the challenged advertising ban violated the first amendment. On this issue, the Court divided sharply, but a five to four majority found that the advertising of routine legal services and the fees to be charged for them was protected speech.[6] Therefore, the first amendment did not permit its blanket suppression. In reaching this conclusion, the majority relied heavily on the reasoning of *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* which abrogated the commercial speech doctrine.[7] Thus, though Arizona had a strong interest in regulating the conduct of attorneys, this concern was subordinated to the public's interest in the free flow of information.

The Arizona State Bar advanced several arguments to justify continued restriction of legal advertising, each of which the majority rejected. First, it maintained that advertising would "bring about commercialization which will undermine the attorney's sense of dignity and self-worth."[8] The Court dismissed

5. The attorneys argued that the recent cases of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), demonstrated that the Court intended to depart from the *Parker* rule. The Supreme Court found these cases distinguishable, and their reasoning supportive of the conclusion that the *Bates* advertising regulation fell within the *Parker* exemption. 433 U.S. at 359-63.

6. Justice Blackmun delivered the opinion, joined by Justices Brennan, White, Marshall and Stevens. Chief Justice Burger, along with Justices Stewart, Powell, and Rhenquist, concurred in part and dissented in part. Each dissenting justice primarily took issue with the majority's failure to precisely define those "routine services" protected by the first amendment. 433 U.S. at 387-405.

7. 425 U.S. 748 (1976). *See* note 4, *supra.*

8. 433 U.S. at 368.

this contention, finding the "postulated connection" between advertising and professionalism "severly strained."[9] It noted that clients were well aware that attorneys must profit from the legal services they render in order to earn a living.

Second, the state bar argued that attorney advertising was inherently misleading due to the variety of services required and skills of the attorney. In rejecting this argument, the Court simply stated that "routine services" such as "uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like" lend themselves to advertising.[10]

Third, the state bar envisioned an adverse effect on the administration of justice, maintaining that advertising would have the undesirable effect of stirring up litigation. The Court resolved this argument by reasoning that it is better to have crowded calendars than unredressed wrongs. It determined that the purpose of advertising in a free-market economy is "for a supplier to inform a potential purchaser of the availability and terms of the exchange."[11] Thus, advertising could inform the middle 70% of the population currently not served by attorneys that suitable representation is available at a reasonable price.

Fourth, the Arizona bar warned of the undesirable economic effects, pointing out that advertising expenses would be passed on to the public and increase the cost of legal services. The Court concluded that the reverse might be true; *i.e.*, that advertising would likely reduce the cost of legal services by promoting open competition among attorneys. The bar additionally argued that advertising would have an adverse effect on the quality of legal services. It feared that an attorney might advertise and deliver a set "package" regardless of the client's needs. The Court did not agree that a ban on advertising either reduced or eliminated shoddy practices.[12]

Finally, the state bar argued that the difficulties inherent in enforcing a partial restriction compelled outright prohibition, since a regulatory agency would be required to ensure that the public was not being misled. The majority was not persuaded that attorneys would use advertising to mislead the public, and reasoned that the few who did so could be dealt

9. *Id.*
10. *Id.* at 372.
11. *Id.* at 376.
12. *Id.* at 377-79.

with in the same manner as other cases of misconduct.

As Justice Powell remarked in his dissenting opinion, *Bates v. State Bar* will "effect profound changes in the practice of Law . . . ."[13] Nevertheless, the Court limited the impact of its decision in several important respects. For example, it did not address the issue of the self-laudatory advertising. Thus, the question remains whether advertising oneself as "the best divorce lawyer in town" would be considered protected speech or deceptive and misleading.[14] The latter category would be subject to regulation.[15]

Similarly, the Court declined to rule on the validity of in-person solicitation, since it was not at issue under the facts in *Bates.* The Court did note, however, that such conduct could pose dangers of overreaching and misrepresentation.[16] As a result, the question of whether or not to engage in in-person solicitation presents the attorney with the same protection/deception dilemma outlined above.

In essence, then, *Bates,* while prohibiting the states from banning all attorney advertising, does not establish any definitive guideline to assist the lawyer in his or her determination of what manner of advertising will be allowed. Apparently, the Court was willing to leave the nuts and bolts of implementation to the vagaries of ABA and state interpretation.

At a recent American Bar Association annual meeting, the ABA passed an amendment to the model ABA Code of Professional Responsibility which updates the code in light of *Bates.* Of the two approaches prepared by the Task Force on Lawyer Advertising, the ABA selected the more restrictive alternative, described as "regulatory" rather than "directive."[17] This

13. *Id.* at 389.

14. Newly enacted ABA Disciplinary Rule 2-101 concerning publicity continues the practice of making self-laudatory statements subject to discipline. It might be argued based on *Bates* that this has a chilling effect on the exercise of protected first amendment rights and is therefore unlawful. *But see* 433 U.S. at 383-84 (claims as to quality of services may be so misleading as to warrant restriction).

15. The Court made it clear in both *Virginia Pharmacy* and *Bates* that misleading commercial speech could be regulated. *See* 433 U.S. at 383-84; 425 U.S. at 771-72.

16. 433 U.S. at 384.

17. Permissible advertising content falls into three broad categories: Office information, description of the practice, and biographical information. There is a provision for expanding the information authorized; an attorney may make application in advance to the agency having jurisdiction under state law for approval of a proposed publication. In-person solicitation is not allowed. Radio announcements are permissible if prerecorded and approved for broadcast by the lawyer. The ABA frowned on the use of television advertising but left the decision on restriction up to the individual states.

amendment simply represents the ABA's interpretation of *Bates* and serves only as a model, which can be reviewed and modified by the states. For the moment, the attorney can be assured that newspaper advertising of routine services (such as uncontested divorces, simpe adoptions, uncontested personal bankruptcies, and changes of name) and the price to be charged for those services is protected.

Michelle La Vally McKim

EQUAL PROTECTION — ILLEGITIMATES — ACKNOWLEDGED ILLEGITIMATE MAY INHERIT FATHER'S ESTATE BY WAY OF INTESTATE SUCCESSION — *Trimble v. Gordon,* 430 U.S. 762 (1977).

Deta Trimble is the illegitimate child of Jesse Trimble and Sherman Gordon, who lived together from 1970 to 1974 when Gordon died intestate. After a paternity order was entered against Gordon in 1973 requiring him to contribute to Deta's support, he voluntarily complied and openly acknowledged the child as his own.

Upon Gordon's death, Ms. Trimble petitioned the Probate Division of the Circuit Court of Cook County, Illinois for a determination of heirship which would declare Deta to be Gordon's sole heir. Relying on the Illinois Probate Act,[1] the trial court rejected the petition and entered an order declaring Gordon's father, mother, brothers and sisters his sole heirs.

Ms. Trimble appealed the trial court's decision on the theory that Section 12 violated the equal protection clause of the fourteenth amendment[2] by denying to illegitimates inheritance rights which were granted to legitimates. The appeal was allowed to proceed directly to the Illinois Supreme Court, which affirmed the trial court's decision without a written opinion. After this adverse finding, she pressed her attack to the United States Supreme Court.

Before the Supreme Court, Ms. Trimble initially contended that illegitimacy was a suspect classification, and thus equal protection required the state to demonstrate that its statutory classification was supported by a compelling interest. If this "strict scrutiny" test were applied, she argued the statute should fail since its prohibition on inheritance by illegitimates was not supported by either the state's interest in promoting

1. Section 12 of the Illinois Probate Act precludes inheritance of a father's estate through intestate succession by an illegitimate child whose parents do not marry subsequent to the child's birth. The child may inherit the mother's estate despite the failure of the parents to formalize their relationship through matrimony; however, even though a father may *openly acknowledge* an illegitimate child as his own, his failure to marry the child's mother prevents the child from inheriting the father's estate under state law. ILL. REV. STAT. ch. 3, §12 (1961) (current version at ILL. REV. STAT. ch. 3, §2-2 (Supp. 1976-77). The revision did not materially alter the provision at issue in this case. Under this statutory provision, if Gordon had acknowledged Deta *and* married Trimble, Deta would inherit Gordon's entire estate. *Id.* ch. 3, §2-1(b) (Supp. 1976-77).

2. The fourteenth amendment of the United States Constitution reads in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

family life or in efficient administration of decedents' estates. Additionally, she maintained that even if the conventional rational relationship test were applied, the statute should also fail, since the prohibition bore no rational relationship to either of the above state interests.

On the other hand, the respondents pointed out that the Supreme Court had never held that illegitimacy was a suspect classification, and that the controlling authority, *Labine v. Vincent,*[3] demanded that the rational relationship test be applied. Under this standard, they argued that the statutory prohibition should be upheld since it was supported by the state's legitimate interest in preventing the spurious claims which might be encouraged by a decision allowing inheritance by illegitimates. Further, based on *Labine,* the respondents maintained that the equal protection clause had not been violated because the state statute did not create an "insurrmountable barrier" to the child's inheritance from its father. Thus, the child might have inherited if the father had left a will naming the illegitimate as a beneficiary, married the child's mother, or stated in his acknowledgment of paternity his desire to legitimate the child.

In finding that the Illinois statute violated the equal protection clause, the Supreme Court retreated from its conclusion in *Labine* that a state legislature has exclusive power to regulate intestate succession within its borders free from the equal protection scrutiny of the federal courts. The Court stated that while judicial deference is appropriate when the challenged statute involves "substantial state interests" in providing for the prompt determination of the distribution of a decedent's property, "there is a point beyond which deference cannot justify discrimination."[4] However, the Court refused to apply the strict scrutiny equal protection standard of review.[5]

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3. 401 U.S. 532 (1971). *Labine* held that Louisiana's statutory scheme, barring an illegitimate child who had been acknowledged but not legitimated from sharing equally with legitimate heirs of the father's estate, did not violate the equal protection clause. Without explicitly articulating the test it was applying, the Court justified its holding on the basis that the statutory classification was not an arbitrary or unreasonable exercise of the state's power to make laws for distribution of a decedent's property within the state.

The Court stated in a footnote, "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the state." *Id.* at 536 n.6.

4. Trimble v. Gordon, 430 U.S. 762, 767-68 n. 12 (quoting in part Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972)).

5. The Court relied on its earlier decision in Mathews v. Lucas, 427 U.S. 495

The equal protection standard applied by the Court involved a three-step analysis: (1) identification of the *stated objectives* of the statute and the *means* used to achieve them; (2) determination of whether there was in fact a correlation between those objectives and the means; and (3) scrutiny of the legitimacy of the stated objectives.

In *Trimble v. Gordon,* the objectives sought to be achieved by limiting the illegitimate's inheritance to the mother's estate were the state's interest in encouraging family relationships and discouraging casual liasons, and its interest in establishing an accurate and efficient method of disposing of property at death.

The Court found no rational relationship between the first objective and the statutory classification in Section 12 of the Illinois code. The Court was unconvinced that penalizing children by denying them inheritance rights from their fathers provided an effective means of discouraging parents from casual liasons and promoting legitimate family relationships. Thus, though the Court recognized there may be *some* relationship between the classification and the asserted goal, it found that the attenuated relationship was inadequate to justify the discriminatory classification, and required the means chosen by the state to *in fact* serve the intended objectives.[6]

As to the second purported objective, the Court concluded that the Illinois court gave inadequate consideration to the relationship between the statutory classification and the asserted goal. Though probative problems in establishing paternity may interfere with the efficient disposition of property, the Court found the Section 12 classification overly broad because it denied inheritance rights to all illegitimates even though paternity was not at issue in all illegitimacy cases. The Court concluded that the difficulties of proving paternity in certain situations did not justify the total statutory disinheritance of illegitimate children whose fathers die intestate.[7] The state's

(1976), in declining to apply the strict scrutiny standard. The *Mathews* Court noted that illegitimates do not suffer the political powerlessness characteristic of classes which have traditionally received that scrutiny. *Id.* at 506 n.13.

6. This requirement substantiates the fact that the Court has adopted a heightened rational relationship standard, because the minimum rational relationship standard, according to the traditional interpretation, requires only a showing of "any state of facts which may reasonably be conceived to justify the classification." McGowan v. Maryland, 366 U.S. 420, 426 (1961).

7. However, it would appear that the case may have been decided differently if the statute were more tailored to the particular objectives sought to be achieved. Apparently the Court would have been more deferential toward a statute which drew

interest in efficient settlement of property disposition would not have been jeopardized by allowing Deta the right to inherit her father's estate because her case did not involve a paternity issue.[8]

In scrutinizing the legitimacy of the objectives sought to be achieved by Section 12, the Court reasoned that the objectives reflected an inappropriate exercise of legislative power. The Court stated "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[9] This review of the legitimacy of the objectives sought to be achieved by the statute constitutes precisely the substitution of values of the justices of the Supreme Court for the choices of the state legislature which the majority in *Labine* and the dissenting opinion by Justice Rhenquist in the present case so strongly disavowed.

The real significance of the Court's opinion lies in its discussion of the appropriate equal protection standard to be applied in illegitimacy cases. Traditionally cases involving illegitimates have been decided according to some fashion of rational relationship standard which requires only that the statutory classification under challenge be supported by some legitimate state purpose. This was the standard applied by the trial court, by the Illinois Supreme Court in a previous illegitimacy case,[10] and implicitly by the United States Supreme Court in *Labine.*

However, recent Supreme Court decisions have suggested that classifications based on illegitimacy might be a proper subject for strict scrutiny review.[11] In *Trimble,* the Court opts for a standard which seemingly falls somewhere between the traditional rational relationship and strict scrutiny tests. Thus, the *Trimble* Court rejected the notion that illegitimacy is a suspect classification requiring strict scrutiny equal protection review; however, it clearly intimates that it is applying a heightened rational relationship standard. The standard of

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a distinction between intestate succession cases which raised paternity problems and those which did not. 430 U.S. at 770-71.

8. *Id.* at 772-73.

9. *Id.* at 769.

10. *In re* Estate of Karas, 61 Ill. 2d 40, 329 N.E. 2d 24 (1975).

11. *See* Jimenez v. Weinberger, 417 U.S. 629 (1974) (where the Court pointed out it had not determined whether illegitimacy was a suspect classification); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (where the Court came close to finding illegitimacy a suspect classification).

review adopted by the Court resembles what Justice Marshall termed the "sliding scale model."[12]

Regardless of how it is labeled, this intermediate standard of review requires a showing of increased rationality or necessity for the discrimination as the statutory classification approaches the status of being constitutionally suspect. This process examines the legislative ends as well as the statutory means, because the final determination of reasonableness depends upon a balancing of the importance of the goals sought to be achieved and the effectiveness of the statutory scheme at achieving them.[13]

In his dissenting opinion, Justice Rhenquist maintained that the Court should exercise the most limited form of equal protection review in illegitimacy cases involving intestate succession—one which would uphold the statutory classification provided it was not "mindless and irrational."[14] He voiced fears that adoption of the heightened rational relationship standard gives the Court unwarranted power of judicial review in an area which has traditionally been a state's prerogative.

The Burger Court has been selective in the benefits and rights it affords illegitimates. There is no discernible framework directing the Court in this area of equal protection review. While in the present case the Court implicitly overrules *Labine* to the extent that it is inconsistent with this decision,[15] only one year earlier the court relied on *Labine* to uphold a Social Security Act provision against due process challenges by illegitimates.[16] The Court's 5-4 decision in *Trimble* illustrates clearly that this area of the law is not settled. However, with the adoption of the heightened rational relationship test of equal protection review in this case, *Labine* can no longer be relied on for the proposition that the state legislatures have exclusive power to regulate intestate succession free of judicial review. Nor can it be assumed that the rational relationship test is the appropriate standard of review in illegitimacy cases, at least those involving the illegitimate child's right to succeed to the property rights of his or her parents.

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12. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 181 (1973).
13. *See* Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974).
14. 430 U.S. at 786.
15. *Id.* at 776 n.17.
16. Mathews v. Lucas, 427 U.S. 495 (1976).

UNEMPLOYMENT COMPENSATION—DISCRIMINATION IN COMPENSATION BASED UPON SEX IS GOOD CAUSE TO TERMINATE EMPLOYMENT VOLUNTARILY—*Morrison v. Unemployment Ins. Appeals Bd.*, 65 Cal. App. 3d 245, 134 Cal. Rptr. 916 (1976).

Juanita A. Morrison was employed by Studio City Hollywood, Inc., a cosmetic company, for approximately twelve years. During that time she became aware that certain male employees were receiving higher wages than she for performing substantially the same work. She repeatedly requested her immediate supervisor to remedy the disparity by raising her wages to meet those of the male employees, but received no indication that her request would be honored. In March of 1973, she conveyed her intent to resign, and submitted a formal written statement of resignation on April 30, 1973, to be effective no later than August 2 of that year. She left her regular employment on July 31, 1973.

On July 5, 1973 Ms. Morrison filed charges with the Equal Employment Opportunity Commission (EEOC),[1] alleging that she had been discriminated against on the basis of sex. After her resignation, she filed a similar charge with the Fair Employment Practice Commission.[2] The resolution of both charges was pending when she voluntarily left her job.

On November 8, 1973, she filed for unemployment compensation benefits citing "unequal pay with male peer" as the basis of her resignation.[3] Her employer responded that she had "[r]esigned to pursue [a] college education and to enter [her] own free lance business to support herself."[4] The Unemployment Insurance Appeals Board admitted the discrimination but held that it did not constitute good cause for voluntary termination of employment and disqualified her for unemployment compensation benefits.[5] After taking the appropriate administrative steps, Ms. Morrison sought a writ of mandate from the superior court directing the Board to set aside its

1. *See* 42 U.S.C. § 2000e-4 (1970). The Equal Employment Opportunity Commission works with state agencies in investigating and eliminating unlawful employment practices under Title VII of the Civil Rights Act of 1964.

2. CAL. LAB. CODE § 1414 (West 1971). The Fair Employment Practice Commission receives, investigates, and resolves complaints alleging discrimination in employment under the California Fair Employment Practice Act.

3. Morrison v. Unemployment Ins. Appeals Bd., 65 Cal. App. 3d 245, 248, 134 Cal. Rptr. 916, 918 (1976).

4. *Id.*

5. *Id.* at 247, 134 Cal. Rptr. at 917.

decision. The writ was denied and Ms. Morrison sought review in the California court of appeal.

On appeal, the judgment was reversed and remanded to the trial court to expedite the writ of mandate. The appellate court upheld Ms. Morrison's contention that where an employee has been discriminated against in the matter of compensation based upon sex, and has made proper requests for equalization of compensation, which have gone unheeded despite ample opportunity for the employer to alleviate the grievance, the employee has good cause to leave her employment voluntarily.[6]

In arriving at its decision the court considered the purposes of the provisions of the California Unemployment Insurance Code, the California Labor Code, analogous federal legislation, and judicial interpretations of these statutes.

Initially, the court noted that the purpose of the California Unemployment Insurance Code, as stated in section 100, is to alleviate the hardship caused by involuntary unemployment.[7] Further, the court pointed out that section 1256 provides that an employee will be disqualified for unemployment compensation benefits if she has left her employment voluntarily without good cause or has been discharged for misconduct during her employment.[8] The court, in turn, defined good cause as "an adequate cause, a cause that comports with the purposes of the Unemployment Insurance Code and with other laws."[9] After examining these purposes, the appellate court concluded that an employer's failure to alleviate discriminatory employment conditions, in the wake of an employee's protests, afforded the employee good cause to quit the employment.

In dealing with the good cause issue, the *Morrison* court examined two recent appellate court decisions that touched on it and harmonized an apparent split of authority between them. In the first, *Warriner v. Unemployment Insurance Appeals Board,* petitioner had decided to resign due to age and complained of a disparity in pay between herself and her male

6. *Id.* at 253, 134 Cal. Rptr. at 920.

7. *See* CAL. UNEMP. INS. CODE § 100 (West 1972).

8. *See* CAL. UNEMP. INS. CODE § 1256 (West Supp. 1977).

9. 65 Cal. App. 3d at 253, 134 Cal. Rptr. at 920 (quoting Syrek v. California Unemployment Ins. Appeals Bd., 54 Cal. 2d 519, 529 P.2d 625, 630, 7 Cal. Rptr. 97, 102 (1960)). The *Morrison* court reasoned that the "good cause" portion of section 1256 should not be given an interpretation in derogation of the purposes of other federal and state statutes prohibiting sex discrimination in employment. *Id.* at 249-50, 134 Cal.Rptr. 918.

replacement.[10] She received a raise and benefits from her employer which resolved this complaint, but she later left her employment due to her continuing dissatisfaction with the company's alleged discriminatory replacement policy. In denying the petitioner's request for unemployment compensation benefits, the court reasoned that as long as economic compensation was available in continued employment at a nondiscriminatory rate of pay, there could be no good cause for voluntary termination of employment.[11] The court thus interpreted the purpose of the unemployment insurance laws to be purely economic rather than remedial as well.[12]

In the second, *Prescod v. Unemployment Insurance Appeals Board,* the petitioner was rehired after her maternity leave at the same pay level but at a lower grade.[13] This change in status later deprived her of a promotion opportunity and was therefore a discriminatory practice based upon sex. The court found that where an employer's practices have created intolerable working conditions, an employee may be found to have good cause for voluntary termination of her employment under section 1256, despite the availability of employment.[14] This court found *Warriner* "unpersuasive," and unlike in *Warriner* interpreted the purpose of the unemployment insurance laws to be both economic and remedial.[15]

The inconsistency between these two cases seems to have been reconciled in *Morrison.* In *Warriner* the petitioner's complaint of discrimination in pay based upon sex had been resolved by her employer's adjustment of her pay and an award of additional benefits.[16] Her remaining complaint should have been resolved by methods other than termination of employment. This reasoning is consistent with the indication in *Morrison* that a claim based on past discrimination which has now ceased does not provide good cause for voluntary termination of employment and that other legal methods should be sought to enforce such a claim[17]

In *Prescod,* discrimination in pay based upon sex persisted in the form of a loss of promotion opportunity and the em-

10. 32 Cal. App. 3d 353, 356, 108 Cal. Rptr. 153, 154 (1973).
11. *Id.* at 358, 108 Cal. Rptr. at 156.
12. *Id.* at 360, 108 Cal. Rptr. at 157.
13. 57 Cal. App. 3d 29, 32, 127 Cal. Rptr. 540, 545 (1976).
14. *Id.* at 40, 127 Cal. Rptr. at 547.
15. *Id.* at 39-40, 127 Cal. Rptr. at 547.
16. 32 Cal. App. 3d at 356, 108 Cal. Rptr. at 154.
17. 65 Cal. App. 3d at 253, 134 Cal. Rptr. at 920.

ployer's refusal to accommodate the employee's request for transfer. The *Morrison* court stated that an employee need not be subjected to such intolerable treatment by an employer.[18] It suggested that these adverse conditions could have such a detrimental impact on the employer-employee relationship as to affect the employee's performance and thereby justify the employer in discharging the employee.[19]

The court's clarification of what constitutes good cause for voluntary termination of employment under section 1256 of the Unemployment Insurance Code strengthens the effectiveness of statutory and constitutional safeguards against sex discrimination in employment. The prohibitions against the discriminatory practices of employers would be meaningless if the employee's only alternatives are: 1) to endure the stress of employer-employee relations created by the employee's pursuit of remedies solely under anti-discrimination legislation while continuing employment, or 2) terminate employment and be disqualified for unemployment compensation because such employment is still available.[20]

By acknowledging that the availability of remedies under various types of legislation does not negate good cause to voluntarily terminate employment, the employee is given a viable alternative to an intolerable employment situation. In addition, the recent adoption of section 1256.2 to the Unemployment Insurance Code provides employees with this protection against the deprivation of equal employment opportunities on the basis of sex by codifying the holding in *Morrison*.[21]

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18. *Id.*

19. *Id.*

20. *Id.* at 252, 134 Cal. Rptr. at 920. The court discussed a recent Oregon case, Fajardo v. Morgan, 15 Or. App. 454, 516 P.2d 495 (1973), which seemed to reinforce the *Morrison* decision in stating that good cause for voluntary termination of employment exists apart from the fact that various remedies are available under anti-discrimination legislation. A claimant who has the requisite good cause to leave his employment voluntarily cannot be denied unemployment compensation benefits if he leaves rather than seeks a remedy under such legislation while continuing to work for the discriminating employer.

21. CAL. UNEMP. INS. CODE § 1256.2 (West Supp. 1977) provides:

> An individual who terminates his employment shall not be deemed to have left his most recent work without good cause if his employer operated so as to deprive him of equal employment opportunities because of that individual's race, color, religious creed, sex, national origin, ancestry, or physical handicap, except that this section shall not apply:
>
> (a) To a deprivation based upon a bona fide occupational qualifi-

cation or applicable security regulations established by the United States or this state.

(b) If the individual fails to make reasonable efforts to provide the employer with an opportunity to remove any unintentional deprivation of the individual's equal employment opportunities.

PROFESSIONAL RESPONSIBILITY—A PUBLIC DEFENDER FULFILLS HIS RESPONSIBILITIES WHEN HE ENSURES THAT A DEFENDANT'S STATUTORY AND CONSTITUTIONAL RIGHTS ARE PROTECTED WHERE HIS CLIENT LACKS A MERITORIOUS DEFENSE YET DECLINES TO PLEAD GUILTY—*People v. Huffman*, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (1977).

On the basis of overwhelming direct evidence, Charles Huffman was convicted of forcible rape, attempted forcible rape, and assault by means of force. Huffman urged on appeal that his conviction should be overturned for one of three reasons: that he was inadequately represented by the public defender; that the trial court erred in not holding a full hearing on his motion for substitution of counsel; and that the trial court erred in failing to advise him of his constitutional rights when he withdrew his insanity plea.

With respect to the representation issue, Huffman claimed that his public defender did not provide him with an adequate defense because he did not conduct a proper voir dire of the jury, cross-examine any witnesses, make an opening or closing statement, interpose any objections, or offer any witnesses on Huffman's behalf.[1]

Before addressing this issue, the court of appeal commented on the ethical responsibilities of the public defender vis-à-vis his client. It noted that where a defendant lacks a viable defense yet refuses to plead guilty, a public defender has fulfilled his ethical responsibilities when he ensures that the defendant's statutory and constitutional rights have been protected.

Turning to Huffman's representation challenge, the court initially focused on the public defender's failure to ask any questions of the prospective jurors during voir dire. It observed that the trial judge had fairly and thoroughly conducted his own voir dire, which covered fifty pages of the trial transcript. Concluding that there was "very little left for anyone to ask," the court found nothing inadequate in the public defender's decision not to engage in voir dire.[2]

With respect to Huffman's attack on the public defender's trial tactics, the court asserted that the strategy of the public defender "to keep a low profile"[3] was necessary in order not to

1. People v. Huffman, 71 Cal. App. 3d 63, 69, 139 Cal. Rptr. 264, 270 (1977).
2. *Id.* at 69, 139 Cal. Rptr. at 270.
3. *Id.*

exacerbate Huffman's already weak position. In regard to the public defender's failure to cross-examine the prosecutor's witnesses, the court noted that the witnesses were not only the victims of the assaults, but were also minors, and interviewing them "is a practice fraught with danger and the possibility of adverse repercussions."[4]

Huffman also alleged that the public defender did not present any of several available defenses.[5] In rejecting the viability of the proferred defenses, the court noted that a claim of inadequate representation must be "factually demonstrated and not based on mere speculation."[6] The court added that *People v. Jenkins*,[7] requires that "the record must establish that counsel was ignorant of the facts or the law and that such ignorance resulted in the withdrawal of a crucial defense reducing the trial to a farce or a sham."[8] Finding that Huffman failed to carry his burden of proving specific instances of incompetence, the court concluded he was not inadequately represented.

The appellate court next analyzed Huffman's claim that the trial court erred in not holding a full hearing on his motion for substitution of counsel in compliance with *People v. Marsden*.[9] A *Marsden* hearing requires that the defendant must be given full opportunity to state specific examples of alledgedly inadequate representation.[10] Huffman argued that the trial judge erred by failing to inquire into the rationale behind the public defender's trial strategy, as required by California case law.[11]

In dismissing defendant's argument, the *Huffman* court was persuaded by the reasoning of Judge Draper's dissent in *People v. Groce*.[12] In *Groce*, Draper maintained that inquiries concerning trial strategy "would confront defense counsel with an impossible dilemma. To assert a 'tactical reason' would necessarily concede the existence of evidence adverse to defendant but not yet produced by the prosecution."[13] Relying on this reasoning, the appellate court concluded that the trial

4. *Id.* at 70, 139 Cal. Rptr. at 271.
5. *Id.*
6. *Id.* at 71, 139 Cal. Rptr. at 272.
7. 13 Cal. 3d 749, 532 P.2d 857, 119 Cal. Rptr. 705 (1975).
8. 71 Cal. App. 3d at 71, 139 Cal. Rptr. at 272.
9. 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).
10. *Id.* at 121, 456 P.2d at 47, 84 Cal. Rptr. at 266.
11. *See, e.g.*, People v. Munoz, 41 Cal. App. 3d 62, 115 Cal. Rptr. 726 (1974); People v. Groce, 18 Cal. App. 3d 292, 95 Cal. Rptr. 688 (1971).
12. 18 Cal. App. 3d 292, 95 Cal. Rptr. 688 (1971).
13. *Id.* at 297, 95 Cal. Rptr. at 690.

judge was not bound to inquire into the state-of-mind of a court-appointed counsel in order to satisfy the *Marsden* requirement of providing a defendant with a full and fair opportunity to present argument or evidence in support of his contention of inadequate representation.

Finally, the court focused on Huffman's contention that the trial court was remiss in failing to advise him of his constitutional rights when he withdrew his insanity plea. Specifically, he argued that the trial court was required to and did not receive his express waiver of the privilege against self-incrimination. While noting that an informed waiver of this privilege was required in the entry of a guilty plea, the appellate court found no such requirement when a plea was withdrawn. The court further noted that the trial judge accepted the insanity plea only after an extended inquiry, at the conclusion of which "there wasn't any doubt in the judge's mind" as to Huffman's sanity.[14] Thus, "free withdrawal of the insanity plea" was properly permitted.[15]

In *People v. Huffman,* the California Court of Appeal issued a forceful statement on a public defender's responsibility to a client who is adamant about his innocence yet has no meritorious defense. While adhering to the general proposition that a public defender has fulfilled his ethical responsibilities when he has ensured that a defendant's statutory and constitutional rights are protected, the court opted for a "situational approach" in dealing with the question of inadequate representation. Under this approach, the circumstances of the case weigh heavily in the assessment of whether or not the public defender's trial strategy was appropriate.[16]

The value of this approach is its tailoring of a public defender's ethical responsibilities to the specific needs of his client. However, its weakness lies in the fact that it permits the public defender's personal opinion on the strength of his client's case to dictate his ethical responsibilities. Thus, if this

14. 71 Cal. App. 3d at 73, 139 Cal. Rptr. at 274.

15. *Id.*

16. It seems clear that the facts must be critical. If they weren't, *Huffman* would stand for the proposition that a defendant has been adequately represented when a public defender does not conduct a voir dire, make an opening or closing statement, cross-examine any witnesses, or present any witnesses on the defendant's behalf, regardless of what defenses might be available. This would seem to contradict the standard set forth in People v. Jenkins, 13 Cal. 3d 749, 532 P.2d 857, 119 Cal. Rptr. 705 (1975) (counsel's failure to present crucial defense may result in ineffective representation).

opinion is unfavorable, it may unduly color the public defender's conduct at the subsequent trial.

Additionally, the *Huffman* court parted company with prior appellate decisions that required a court inquiry into the state-of-mind of a public defender on a *Marsden* motion. The court adopted the proposition expressed in the *Groce* dissent that an inquiry into defense counsel's thinking process upon a motion for substitution of counsel "would clearly enure to the benefit of the prosecution."[17] Thus, *Huffman* reflects a recognition that the dangers inherent in preventing a court-appointed attorney from freely structuring his defense outweighs the possibility of subjecting the defendant to incompetent counsel.

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17. 71 Cal. App. 3d at 73, 139 Cal. Rptr. at 274.

CONSTRUCTION CONTRACTS—PRIME CONTRACTOR'S RELIANCE ON THE ORAL BID OF A MATERIALMAN IS INSUFFICIENT TO ESTOP THE ASSERTION OF A STATUTE OF FRAUDS DEFENSE—*C.R. Fedrick, Inc. v. Borg Warner Corp.*, 552 F.2d 852 (9th Cir. 1977).

C.R. Fedrick, Inc. (Fedrick), in preparation for its bid as a prime contractor on a construction project, sought bids from various materialmen and suppliers. A few minutes before Fedrick submitted its bid on the prime contract, a pump supplier, Borg Warner, telephoned in an offer to supply Fedrick with pumps, required by the prime contract, at a price of $826,550. This bid was more than $450,000 lower than any previous one. Fedrick, in reliance on this low bid, lowered its own bid for the overall project by $200,000. On the following day Fedrick orally communicated to Borg Warner that in the event Fedrick obtained the prime contract it would purchase the pumps from Borg Warner.

Subsequent to the conversation, Borg Warner discovered it could not supply the pumps, as specified, at its original bid price. To rectify this situation, it sought modification from Fedrick of both the specifications and its bid. Fedrick responded that it intended to hold Borg Warner to its original telephone bid. When Fedrick was awarded the prime contract, Borg Warner refused to honor its bid and indicated it would only supply pumps with modified specifications. Fedrick purchased the pumps in the open market for a price of $1,162,000.

Fedrick filed a breach of contract action in superior court against Borg Warner alleging damages of $95,903,[1] and it was removed to United States district court on the basis of diversity jurisdiction. The district court applied the relevant California law and concluded that despite Fedrick's reliance on Borg Warner's bid and substantial damage suffered as a result of Borg Warner's refusal, it could not recover. Fedrick appealed.

On appeal, the sole issue was whether Borg Warner was estopped from asserting the statute of frauds as a defense to the

1. This damage figure does not represent the standard measure of damages or "cover" for a seller's breach. *See* U.C.C. § 2-712. Cover is measured by the difference between the contract price and the cost of substituted goods. The cost of Fedrick's cover would have been $335,450 rather than $95,903. Though the facts of the case are unclear, it is reasonable to assume that based on the time lag between when Fedrick learned of the breach and when purchase of the substitute goods was actually made, the $95,903 figure does not represent "cover" damages but rather the difference between the market price and contract price.

alleged breach. Fedrick argued that both its detrimental reliance on Borg Warner's bid and the unconscionable injury it suffered as a result of such reliance removed the transaction from the operation of the statute. Under California law, an oral bid received by a contractor from a subcontractor is irrevocable for a reasonable period of time if the contractor relies on the bid in the computation of his own bid to the general contractor or owner.[2] Similarly, if one party promises to perform and the other party in reliance suffers an "unconscionable injury," the former will be precluded from asserting a statute of frauds defense.[3] Conversely, Borg Warner maintained that the absence of a written memorandum made the transaction unenforceable. Borg Warner's position was bottomed on the language of California Commercial Code section 2201, which requires that all contracts for the sale of goods priced at $500 or more must be evidenced by a writing to be enforceable.[4]

The Ninth Circuit Court of Appeals agreed with Borg Warner's argument and determined that "Borg was not estopped from relying upon C.C.C. § 2201(1) in the course of action taken and the District Court did not err on this issue."[5]

In analyzing the detrimental reliance claim, the Ninth Circuit drew a fundamental distinction between a materialman, who supplies material only, and a subcontractor, who supplies both materials and services. In interpreting the applicable California law, the court reasoned that only dealings involving contractors and subcontractors give rise to the detrimental reliance exception to the terms of section 2201. With respect to materialmen, the court maintained that the California Supreme Court would not render the terms of 2201 "a nullity" in a situation where only the "sale and delivery of specific goods" was involved.[6] Thus, a contractor's detrimental reliance on a materialman's bid was insufficient to estop the assertion of a statute of frauds defense.

While recognizing the "unconscionable injury" exception to the statute of frauds, the Ninth Circuit disagreed with Fedrick's charge that it had suffered an unconscionable injury,

2. *See, e.g.*, Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); Saliba-Kringlen Corp. v. Allen Engineering Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971); H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc., 14 Cal. App. 3d 848, 92 Cal. Rptr. 669 (1971).

3. *See* Monarco v. LoGreco, 35 Cal. 2d 621, 220 P.2d 737 (1950).

4. CAL. COM. CODE § 2201 (West 1964).

5. C.R. Fedrick, Inc. v. Borg Warner Corp., 552 F.2d 852, 858 (9th Cir. 1977).

6. *Id.* at 857.

despite its substantial pecuniary loss. The majority indicated that Fedrick's loss was akin to the loss of bargain or loss of profit on resale which has been recognized as being insufficient to estop the assertion of a statute of frauds defense.[7] In effect, the Ninth Circuit reasoned that "even if Fedrick incurred a loss on the pumps, there was still no unconscionable injury inasmuch as Fedrick made a profit on the prime contract."[8]

The *Fedrick* court's interpretation of California law in relation to both exceptions of the statute of frauds seems unduly restrictive and open to question. In its confinement of the detrimental reliance exception to subcontractors, it departs from the intent behind such cases as *Drennan v. Star Paving Co.*,[9] by giving new and unnecessary vitality to the statute of frauds. Similarly, the court's reasoning as applied to this exception upset the normal industry practice of relying on oral bids from materialmen, and creates a distinction between materialmen and subcontractors that is not normally observed in practice.[10]

In regard to the unconscionable injury exception, the *Fedrick* court's analysis arguably failed to properly characterize the loss Federick suffered. Fedrick was not seeking to recover damages in the nature of an expectancy, but rather "the out-of-pocket losses which it incurred when, in order to meet its contractual responsibilities it purchased pumps at a price significantly higher than that offered by Borg."[11] Thus, as a result of Borg Warner's conduct, Fedrick suffered actual pecuniary damage, since it was still bound on its contract, at the original bid price. The concept of equitable estoppel is designed to prevent just such a loss.[12]

Despite the weaknesses in its reasoning, *Fedrick* is the only law in the area—no California case has considered this precise issue. Consequently, the results of the case are especially important to those California contractors who bid on federal jobs, or receive bids from out-of-state suppliers. Until the issue presented in *Fedrick* is adjudicated in the California state courts,

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7. *See, e.g.*, Carlson v. Richardson, 267 Cal. App. 2d 204, 72 Cal. Rptr. 769 (1968).

8. 552 F.2d at 859 (Wallace, J., dissenting).

9. 51 Cal. 2d 409, 333 P.2d 757 (1958).

10. *See* Comment, *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1063-64 (1957); Comment, *Construction Bid Shopping*, 18 U.C.L.A. L. REV. 389 (1970).

11. 552 F.2d at 859 (Wallace, J., dissenting).

12. *See* Monarco v. LoGreco, 35 Cal. 2d 621, 220 P.2d 737 (1950).

all contractors in the state should seriously reconsider the revision of their bidding procedures.

Joseph Dworak